MAYBANK BHD

v.

ASSOCIATION OF MAYBANK CLASS ONE OFFICERS (AMCO)

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[JUDICIAL REVIEW NO: R2-25-103-07]
20 MAY 2010

EVIDENCE: *Corroboration - Discretion of court to require - Bank's employee found guilty by domestic inquiry of getting someone to forge her signature on attendance register - Employee punished with freeze on salary increment - Appeals against punishment rejected - Dispute referred to Industrial Court - Testimony of handwriting expert sole evidence against employee - Expert's findings in grave doubt - Whether court right in requiring corroborative evidence - No evidence adduced to establish validity of domestic inquiry and accuracy of inquiry notes - Whether inquiry flawed*

CIVIL PROCEDURE: *Judicial review - High Court - Certiorari - Application to quash decision of Industrial Court - Whether allowed*

A domestic inquiry was held by the applicant ('the bank') against one of its employees ('the employee') on three charges of misconduct and breach of duty. The employee was found guilty only on the charge of requesting some other person to write her name and forge her signature in the 'out' column of the bank's attendance register. Subsequently, the employee was informed by the bank that her salary increment would be frozen for two years. The employee appealed to the bank to reconsider its decision on the freeze but the appeal was rejected. The employee then sought the assistance of the respondent but the latter's appeal to the bank on her behalf was also rejected. The respondent then referred the dispute to the Industrial Relations Department, which, unable to resolve the said dispute, referred it to the Human Resources Minister who, in turn, referred the matter to the Industrial Court which decided in favour of the employee. Hence, the bank applied to this court for an order of *certiorari* to quash the said decision. In the Industrial Court, the bank did not adduce any direct evidence to show that the employee did, in fact, request someone to write her name and forge her signature on the register. The only evidence against the employee was that of a handwriting expert regarding the authorship of the signature. The expert's testimony was vigorously challenged by the respondent, leading

the Industrial Court to conclude that (i) there were grave doubts in his findings (ii) that his testimony was not strong enough to stand on its own and (iii) that it required corroboration. The bank *inter alia* contended that the Industrial Court erred in law and acted without or in excess of jurisdiction in condemning the bank's witnesses and failed to give any or any proper appreciation to the material evidence adduced in court, in particular, the notes of the domestic inquiry.

Held (dismissing the application with costs):

(1) The Industrial Court did not commit an error of law and its decision was not perverse or so devoid of plausible justification that no reasonable body of persons could have reached it. Furthermore, the court had considered or admitted evidence which were relevant to the issues and came to a correct conclusion. (para 20)

(2) As the handwriting expert's evidence was the only evidence that implicated the employee, the Industrial Court was right in adopting the view that corroboration was needed as the expert's evidence was not strong enough to stand alone on its own. The court had given careful consideration to the expert's findings and concluded that it gave rise to grave doubts. (paras 7 & 10)

(3) The Industrial Court could not be faulted for holding that the domestic inquiry was flawed as the applicant had failed to lead evidence to establish the validity of the inquiry and the accuracy of the inquiry notes that had been recorded. (para 18)

(4) There was no record to show that the employee was called upon or given the opportunity to give evidence to defend the allegations against her; hence there was fundamental breach of natural justice which vitiated the validity of the inquiry. (para 17)

Case(s) referred to:

Dr K Shanmuganathan (Suing By His Attorney Dr A Puraviappan) v. Periasamy Sithambaram Pillai [1994] 2 CLJ 225 HC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Magan Bihari Lal v. State of Punjabi AIR 1977 SC 1091 ***(refd)***

Maybank Berhad v. Association Of Maybank Class One Officers (AMCO) [2007] 2 ILR 408 ***(refd)***

Murali Lal v. State of MP [1980] 1 SCC 158 ***(refd)***

PP v. Mohamed Kassim Yatim [1976] 1 LNS 105 HC ***(refd)***

R Rama Chandran v. Industrial Court Malaysia & Anor [1997] 1 CLJ 147 FC ***(foll)***

Shashi Kumar v. Subodh Kumar AIR 1964 SC 529 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 18(1)

For the applicant - TM Varughese; M/s TM Varughese & Co
For the respondent - S Muhendran; M/s Muhendaran Sri

[Editor's note: For the Industrial Court judgment, please see Maybank Berhad v. Association of Maybank Class One Officers (AMCO) [2007] 2 ILR 408.]

Reported by Ashok Kumar

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

[1] This case concerns an application by the applicant for judicial review for an order of *certiorari* to quash *Maybank Berhad v. Association Of Maybank Class One Officers (AMCO)* [2007] 2 ILR 408 (Award No. 788 of 2007) handed down by the Industrial Court on 10 April 2007.

[2] After hearing learned counsels for the applicant and the respondent and after considering the submissions filed by both parties, the court dismissed the application with costs.

Brief Facts

[3] The brief facts may be stated as follows:

(a) The dispute between the respondent and the applicant is with regards to the disciplinary action taken by the applicant against one of the claimants ie, Ms Yap Siew Chooi ("the claimant").

(b) The claimant commenced employment with the applicant on 2nd May 1984 as officer 2.

(c) The claimant was promoted to class 1 officer effective 1991.

(d) The claimant received a letter dated 14 January 1999 from the applicant informing her that a domestic inquiry would be held against her on 25 January 1999. In the letter, the bank made three allegations against the claimant.

(e) The three allegations against the claimant are as follows:

> In view of the above, it is hereby alleged that you had:
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> (i) On 10/3/98 committed a serious act of misconduct by requesting someone else to write your name and forge your signature in the "out" column on the attendance register.

(ii) On 16/2/98 acted inconsistent with the expectation of the Bank by requesting someone else to write your name in the "out" column on the attendance register and only signed out on the next working day.

(iii) Committed a serious breach of duty by failing to exercise supervision which enabled the above misconducts to be committed by your subordinates.

(j) Then, the claimant received a letter dated 13 July 1999 from the applicant informing her that the panel of inquiry found her guilty of the 1st charge and not guilty of the 2nd and 3rd charge preferred against her.

(k) *Vide* the same letter, the applicant informed the claimant that the applicant's staff committee decided to stop the claimant's salary increment for a period of two years effective from 1 July 1999. The applicant also informed the claimant that her next increment would be 1 July 2001 onwards.

(l) The claimant who was dissatisfied with the outcome of the domestic inquiry and the punishment meted out against her, appealed by way of a written letter dated 23 August 1999 requesting the applicant to reconsider its decision on the punishment meted out against her.

(m) The claimant received a letter dated 23 October 1999 from the applicant informing her that her appeal against the punishment meted out against her, had been rejected by the applicant's staff committee.

(n) The claimant dissatisfied with the applicant's reply wrote a letter dated 8 December 1999 to the respondent, seeking assistance to remedy the unwarranted punishment meted out against her.

(o) The respondent upon receiving the claimant's letter dated 8 December 1999 appealed against the punishment meted out against the claimant, which was again rejected by the applicant.

(p) As the dispute between the applicant and the respondent over the punishment meted out to the claimant could not be resolved amicably, the dispute was then referred by the respondent to the Industrial Relations Department as provided for by s. 18(1) of the Industrial Relations Act 1967.

(q) The Industrial Relations Department was unable to resolve the said dispute, thus causing the said dispute to be referred to the Honourable Human Resources Minister who consequently found it fit to be referred to this Honourable Court.

(r) After having heard the evidence adduced by both the applicant and the respondent and having perused the respective parties written submissions, the Industrial Court proceeded to hand down its decision *vide* Award No. 788 of 2007 dated 10 April 2007.

Applicant's Submission

[4] The cornerstone of the applicant's submission is that the Industrial Court erred in law and acted without or in excess of jurisdiction in that it condemned the applicant's witnesses and excluded entirely and failed to give any or any proper appreciation of the material evidence adduced in court.

[5] In particular, the applicant contends that the Industrial Court's award was made entirely on an erroneous legal basis wherein the learned chairman by his volition cited a High Court case of *Dr K Shanmuganathan (Suing By His Attorney Dr A Puraviappan) v. Periasamy Sithambaram Pillai* [1994] 2 CLJ 225 which is a case that has already been set aside by the Federal Court. In that case, the Federal Court held that the opinion of an expert witness was no requirement in law that such evidence be corroborated.

Findings Of The Court

[6] It is clear from the evidence adduced before the Industrial Court that the only piece of evidence linking the claimant to guilt of charge 1 is the evidence of the expert evidence. The learned chairman said:

> The main and sole ingredient of this charge is that the Claimant had made request to someone to write her/Claimant's name and to forge her signature in the "out" column in the attendance register. The relevant attendance register for the relevant date of 10th March 1998 is produced as CLB p. 4 in the Union's bundle of documents. This particular attendance register is not in dispute so is the particular entry No. 13 in the "out" column which is the subject of the charge. Was there a request made by the Claimant to someone to do the acts as alleged in this charge? It is clear from the evidence adduced that no evidence was ever produced by the Bank as to show that a request was made by the Claimant to someone; who that "someone" was in fact not known. In short there is absolutely no direct evidence from the Bank to prove the ingredient of the Claimant having made such a request to someone as in this 1st Charge against the Claimant. The evidence for which the Bank had solely relied on is basically circumstantial from the handwriting expert, Mr Siow Kwen Sia ("COW2") who on 16 November 1998 was requested by the Bank to determine the authorship of the written entries of not only the Claimant but also of Intan/Asmah on some H.O Building Management attendance register forms.

[7] In view of the fact that "COW2's" evidence was the only evidence implicating claimant to charge I, I am of the considered opinion that the learned chairman of the Industrial Court as finder of facts was right in adopting the view that corroboration was needed, as "COW2's" evidence was not strong enough to stand alone on its own.

[8] The fact that the High Court's decision in *Dr Shanmuganathan's* case *(supra)* has been reversed by the Federal Court is not disputed. However, it is pertinent to take note why the High Court's decision was reversed. The High Court had excluded in toto or did not sufficiently consider the expert evidence. According to the Federal Court, the High Court should consider all evidence adduced before coming to a finding. In this regard, the Federal Court said:

> The learned Judge should have considered the reasoning given by the expert and with that assistance arrived at the conclusion. In failing to do so the learned Judge had abdicated his function. **The learned Judge is entitled to reject the evidence but not before considering such evidence**. The evidence of the expert is admissible and relevant to the fact in issue properly placed before the learned Judge. **The learned Judge ought to consider all such evidence that is before him prior to arriving at a finding on the issue. Only after such due consideration been given could he come to a finding**. In the case before us, the learned Judge did not consider the evidence of PW1 at all. The learned Judge did not determine the issue of the forgery. (emphasis added)

[9] In the present case, learned counsel for the respondent had vigorously challenged the evidence of the expert witness. In the award, the learned chairman held as follows:

> In our instant case, the Claimant has challenged the evidence of "COW2" extensively. This Court is urged to reject "COW2's" evidence on numerous flaws and doubts in his evidence. Statement and oral evidence in court together with his report COB p. 10-18 (COB1A inclusive) and all evidence before this Court as a whole, this Court agrees that there were doubts created in the evidence of "COW2" giving rise to grave doubts in his findings and conclusion in respect of the signature and writing in Entry No. 13 in the "Out" column in the Attendance Register dated 10 March 1998 (CLB p. 4) which implicated the Claimant.

[10] The learned Chairman of the Industrial Court gave careful consideration of the findings made by the expert witness, ie, "COW2" and thereafter came to a conclusion that the said findings of "COW2" gives rise to grave doubts.

[11] It is settled law that evidence of an expert witness is not conclusive because it is only opinion evidence (see *PP v. Mohamed Kassim Yatim* [1976] 1 LNS 105). The objective of an expert evidence is merely to assist the court to form its own opinion. The court is the final arbiter, not the experts or eyewitness.

[12] Therefore, it is only proper for the Industrial Court as a matter of prudence, in the circumstances of this case, to hold that the evidence of the expert witness needs corroboration as "COW2's" evidence is not strong enough to stand alone on its own.

[13] There are plethora of worthy authorities to support this proposition of law. In *Murali Lal v. State of MP* [1980] 1 SCC 158, the Supreme Court of India said:

> Expert testimony is made relevant by Section 45 of the Evidence Act and where the Court has to form an opinion upon a point as to identity of handwriting, the opinion of a person "special skilled" in questions as to identity of handwriting is expressly made a relevant fact. There is nothing in the Evidence Act, as for example like Illustration (b) to Section 114 which entitles the Court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars, which justifies the court in assuming that a handwriting expert's opinion in unworthy of credit unless corroborated. The Evidence Act itself (Section 3) tell us that "a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists". It is necessary to occasionally remind ourselves of this interpretation clause in the Evidence Act lest we set an artificial standard of proof not warranted by the provisions of the Act. Further, under Section 114 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to facts of the particular case. It is also to be noticed that Section 46 of the Evidence Act makes facts, not otherwise relevant, relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant. So, corroboration may not invariably be insisted upon before acting on the opinion of an handwriting expert and there need be no initial suspicion. *But, on the facts of a particular case, a court may require corroboration of a varying degree. There can be no hard and fast rule, but nothing will justify the rejection of the opinion of an expert supported by unchallenged reasons on the sole ground that it is not corroborated. The approach of a court while dealing with the opinion of a handwriting expert should be to proceed cautiously, probe the reasons for the opinion, consider all other relevant evidence and decide finally to accept or reject it*. (emphasis added)

[14] In *Shashi Kumar v. Subodh Kumar* AIR 1964 SC 529, after noticing various features of the opinion of the expert, the court said:

> We do not consider in the circumstances of this case that the evidence of the expert is conclusive and can falsify the evidence of the attesting witnesses and also the circumstances which go to show that this will must have been signed in 1943 as it purports to be. Besides it is necessary to observe that expert's evidence as to handwriting is opinion-evidence it is usual to see if it is corroborated either by clear direct evidence or by circumstantial evidence. In the present case the probabilities are against the expert's opinion and the direct testimony of the two attesting witnesses which we accept is wholly inconsistent with it.
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> So, there was acceptable direct testimony which was destructive of the expert's opinion; there were other features also which made the expert's opinion unreliable. The observations regarding corroboration must be read in that context and it is worthy of note that even so the expression used was: it is usual and not "it is necessary".

[15] In *Magan Bihari Lal v. State of Punjabi* AIR 1977 SC 1091, the Supreme Court held:

> We are firmly of the opinion that there is no rule of law, nor any rule of prudence which has crystallized into a rule of law, that opinion-evidence of a handwriting expert must never be acted upon, unless substantially corroborated. But, having due regard to the imperfect nature of the science of identification of handwriting, the approach, as we indicated earlier, should be one of caution. Reasons for the opinion must be carefully probed and examined. All other relevant evidence must be considered. In appropriate cases, corroboration may be sought. In cases where the reasons for the opinion are convincing and there is no reliable evidence throwing a doubt, the uncorroborated testimony of an handwriting expert may be accepted. There cannot be any inflexible rule on a matter which, in the ultimate analysis, is no more than a question of testimonial weight.
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> We have said so much because this is an argument frequently met with in subordinate courts and sentences torn out of context from the judgments of this Court are often flaunted.

[16] The next issue raised by the applicant is that the Industrial Court had disregarded the notes of the domestic inquiry filed in court and duly served on or about 14 July 2005 as directed by the court, ie, more than one year prior to the date of the hearing but the court perused the said note of the domestic inquiry and adversely commented that the claimant was not given the opportunity to give evidence to defend the allegations against her.

[17] It is pertinent to note that the findings of a domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh (see *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665). The learned Chairman of the Industrial Court came to a conclusion that there is no record to show that claimant was called or given the opportunity to give evidence to defend the allegations against her; hence there is a fundamental breach of the principle of natural justice which would vitiate the validity of the said domestic inquiry. However despite making such a finding, the Industrial Court had correctly held that a defective domestic inquiry or even the absence of one is not fatal to the proceedings before this court. The Industrial court held as follows:

> [6] This court will not be able to make a finding from the inquiry notes whether a *prima facie* case had been made out against the claimant on the 1st charge as the bank had not requested for the inquiry notes to be marked as a part of the bank's bundle of documents nor was it produced through any witness. No evidence had been led by the bank to establish the validity of the D.I. that had been held and the accuracy of the inquiry notes that had been recorded. Further, from a perusal of the D.I. notes, it is apparent that there was no record to show that the claimant was called or given the opportunity to give evidence to defend the allegations against her; hence there is a fundamental breach of the principle of natural justice which would vitiate the validity of the said D.I. Nevertheless, **a defective domestic inquiry or even the absence of one is not fatal to the proceedings before this Court**. See *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd & Anor* [2004] 1 CLJ 8 CA. Consequently, this court will determine this dispute on the facts and evidence produced before this Court. (emphasis added)

[18] Further, the applicant had failed to lead any evidence to establish the validity of the domestic inquiry and accuracy of the inquiry notes that had been recorded. The Industrial Court had taken note of these failures. As such, the learned chairman in the present case cannot be faulted for having held that the said inquiry was indeed flawed based on a reading of the notes of the domestic inquiry alone as the applicant had failed in its duty to establish the validity of the domestic inquiry.

[19] It well settled law that the High Court can only review an award of the Industrial Court on its substance, if the Industrial Court committed an error where:

(a) it relied upon an erroneous factual conclusion; or

(b) there is no evidence to support its conclusion.

(see *R Rama Chandran v. Industrial Court Malaysia & Anor* [1997] 1 CLJ 147).

A

Conclusion

[20] I am satisfied that the Industrial Court did not commit an error of law and its decision was clearly not perverse and so devoid of plausible justification that no reasonable body of persons could have reached it. The Industrial Court had considered or admitted evidence which are relevant to the issues and came to a correct conclusion.

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[21] For the reasons above stated, the application is dismissed with costs.

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